SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1093.

IN RE: ESTATE OF GILBERT F. RILEY, Deceased, Late of the Borough of Hollidaysburg, County of Blair and Commonwealth of Pennsylvania.

RUSSELL J. RILEY, EARL V. RILEY, FRANCIS RILEY, MRS. MARGARETTA BURKE, MARSHELL MINE, MARCELINE RILEY, LEROY RILEY, HELEN HOUSUM, ROBERT RILEY, FRED SOCIE, MELVIN SOCIE, MRS. GERALDINE PACKER, Intestate Heirs of GILBERT F. RILEY, Deceased,

Petitioners.

On Petition for a Writ of Certiorari to the Supreme Court of the United States.

BRIEF FOR MOST REV. JAMES J. HOGAN, ET AL., RESPONDENTS IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR RESPONDENTS IN OPPOSITION.

This Brief is submitted in response to the Petition filed by Petitioners Russell J. Riley, *et al.*, praying that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, made December 5, 1974, in this proceeding.

OPINION BELOW.

Citation to the opinions below is properly set forth in the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Does Section 7(1) of the Pennsylvania Wills Act violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does Section 7(1) of the Pennsylvania Wills Act violate the Free Exercise Clause of the First Amendment to the Constitution of the United States?

3. Does Section 7(1) of the Pennsylvania Wills Act violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, amendment XIV:

". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Constitution of the United States, amendment I:

"Congress shall make no law . . . prohibiting the free exercise [of religion] . . ."

Pennsylvania Wills Act, Act of April 24, 1947, P. L. 89, § 7(1), 20 P. S. § 180.7(1).

COUNTERSTATEMENT OF THE CASE.

The Statement of the Case is adequately set forth in the Petition, except for its omission to include the following:

Respondents, in the trial court, pointed out that the challenged portion of the statute says, in effect, that the free act of a person, having full testamentary capacity, in choosing to make a bequest or devise for religious purposes, is fraught with a legally imposed risk: if, on account of any accident or other event, he happens to die within thirty days after making the gift, his gift to religion is frustrated. It is obvious that the statute, on its face, must have a chilling effect upon the exercise of testamentary freedom in favor of religious purposes. The prudent testator, knowing that his gift for religious purposes may fail, may well be motivated to forsake the opportunity which the law permits him as to gifts to religion, precisely because that opportunity is so seriously qualified. If, however, he assumes the risk and makes such a gift, his inability to stay alive for thirty days means that the religious purpose which he envisioned, and which he fully intended to use his means to effect, will not be realized.

It is plain that the statute restricts his religious liberty in a significant way, not merely by its limitations as to "religious" purposes, but even by its limitations as to "charitable" purposes. Almsgiving as well as gifts to religious bodies, often intermixes, or blends, so-called "religious" and "charitable" purposes. The gift described as Item IV of the Riley will provides an example of this. But gifts to religion, as well as some gifts to charity, have been immemorially recognized as *religious* acts.

Respondents concluded that the 30-Day Clause places a substantial restraint on a basic form of the exercise of re-

ligion and that no compelling state interest reasonably justifies the statute's violation of religious liberty.

Respondents also pointed out that the statute provides a serious and substantial limitation upon freedom of disposition (and therefore also freedom of receipt) of property, without any standards therefor, and indeed (as has been seen) without justification therefor. It does not call for any proof of, or even evidence of, any fault or failing on the part of the testator. Let it be assumed that he has full testamentary capacity, and that the object of his benevolence is not one which, by its nature, is adhorred in public policy: nonetheless by virtue solely of the happening of his death within thirty days, his will must be frustrated.

Nor does the statute call for any proof of, or even evidence of, any undue influence upon the part of anyone over the testator. The effecting of the mind and purpose of the latter, and the whole course and channeling of his property, are made to depend upon proof of nothing other than an outside event, unrelated to the will or to anyone who had to do with it: a happening whose magical essence is a measured *thirty* days. Respondents therefore concluded that the statute, on its face, violates the Due Process Clause of the Fourteenth Amendment.

THE POSITION OF RESPONDENTS ON THE PETITION FOR CERTIORARI.

The decision of the Supreme Court of Pennsylvania is plainly correct, and the Petition should be denied.

The argument that "*nothing* in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition" (Petition, 7) cannot be given serious weight today. Petitioners state that the decision below is not based upon a finding

that "a rational basis for the statute fails to exist", but Petition does not enlighten the Court as to what that basis is. No credible justification for the statute exists. As the Supreme Court of Pennsylvania stated in its opinion which governs the instant case, the statute, by virtue both of over-inclusiveness and under-inclusiveness, "lacks 'a fair and substantial relation' to the legislative object." (Petition, 18). It is therefore patently void under the Equal Protection Clause, and on that ground the Court would be justified in denying the Petition.

Respondents, however, did not raise any Equal Protection issue below but, as noted *supra*, pointed out that the statute's principal defects lay in its denial of the free exercise of religion and of due process in testamentary disposition. Respondents are constrained to state that the Free Exercise and Due Process issues posed by the Pennsylvania Mortmain statute (and undoubtedly also by the Mortmain statutes of eight other states[1]) are substantial.

Respectfully submitted,

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1. Florida (Fla. Stat. Ann. § 731.19 (1964)); Georgia (31 Ga. Code Ann. § 113-107 (1935)); Idaho (Idaho Code Ann. § 15-2-615 (1971)); Iowa (46 Iowa Prob. Code § 633.266 (1964)); Mississippi (Miss. Const. art. 14 § 270 (1942)); Montana (Mont. Rev. Code Ann. § 91-142 (1947)); New York (N. Y. Estates, Powers and Trusts Law § 5-3.3 (McKinney, 1969)); Ohio (Ohio Rev. Code Ann. § 2107.06 (1953)). California recently repealed its Mortmain statute. Cal. Stats. 1971, c. 1395, p. 2747, § 1.